

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK J. DEWHART,

Defendant-Appellant.

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UNPUBLISHED

July 27, 2001

No. 223455

Wayne Circuit Court

LC No. 99-000512

Before: Wilder, P.J. and Hood and Griffin, JJ.

PER CURIAM.

Defendant was charged with first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a bench trial, the court found defendant guilty of second-degree murder, MCL 750.317, and felony-firearm, and sentenced defendant to consecutive prison terms of eighteen to fifty years and two years. Defendant appeals as of right and we affirm.

Defendant's sole claim on appeal is that the trial court erred in rejecting his claim that the killing constituted voluntary manslaughter on the ground that a sufficient period of time elapsed between the stabbing and the fatal shooting such that a reasonable person could have recovered control of his senses.

In reviewing a nonjury criminal case, this Court "is required to review the entire record to determine whether the trial judge clearly erred." *People v Rush*, 48 Mich App 478, 482; 210 NW2d 467 (1973). This Court must review the record to determine whether there was sufficient evidence to warrant a verdict of guilty beyond a reasonable doubt. *People v Garcia*, 398 Mich 250, 263; 247 NW2d 547 (1976). The trial court's factual findings are reviewed for clear error. A finding of fact is considered "clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464. Malice

may be inferred from all the facts and circumstances of the killing, *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993), including the use of a deadly weapon. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995).

“The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions. The element of provocation distinguishes the offense of manslaughter from murder.” *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), *aff’d* 461 Mich 992 (2000) (citations omitted). Passion “describes a state of mind incapable of cool reflection.” *People v Townes*, 391 Mich 578, 589 n 3; 218 NW2d 136 (1974). The provocation must be “that which would cause a *reasonable person* to lose control,” i.e., it must be “so severe or extreme as to provoke a reasonable man to commit the act.” *Sullivan, supra* at 518-519 (emphasis in original).

The court assumed from the fact that defendant stabbed the victim forty-seven times that he must have been so enraged that he was acting in the heat of passion, but found that there was adequate time for defendant to cool down before he finally shot and killed the victim. However, a necessary element of voluntary manslaughter is that the defendant’s passion was caused by some provocation adequate to cause a reasonable person to lose control of his senses. There was evidence that the couple’s relationship was contentious, given the police reports they filed against one another, and one could reasonably infer that the complaints involved domestic violence. Nevertheless, defendant did not argue, and there was no evidence to show, that the victim did anything to provoke defendant, much less do anything that would cause a reasonable person to fly into a murderous rage. Therefore, the trial court did not err in finding that the killing was not voluntary manslaughter.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Harold Hood

/s/ Richard Allen Griffin